

OFFICE OF THE
COMMISSIONER OF RAILROADS
STATE OF WISCONSIN

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June 18, 2014

9170-RX-300

Re: Petition of the City of Waupun for the Establishment of the Public Crossing of the Wisconsin & Southern Railroad Co. Tracks with Forest Mound Cemetery Trail in the City of Waupun, Dodge County

To The Person Addressed:

Enclosed with this letter you will find the Proposed Decision of the Hearing Examiner. This proposed decision is the hearing examiner's recommendation and not the final decision of the Commissioner of Railroads. The Commissioner will issue a final decision only after considering any written comments on the proposed decision.

Comments, either in support or in opposition, must be filed in writing in time to reach the Office of the Commissioner of Railroads (OCR) not later than 15 days from the date of this letter. One copy of the comments must be filed with the OCR and one copy served by regular mail or in person upon each party of record. Generally, "parties" include those persons and organizations listed in the "Appearance" section of the proposed decision (but not including any members of the OCR staff).

This 15-day period is your opportunity to file any comments on the proposed decision. Comments need not follow any particular format nor do they need to be elaborate. A clear, concise and specific explanation of your comments is sufficient and helpful. Short extensions may be granted upon request in writing or by telephone.

Sincerely,

Douglas S. Wood, Hearing Examiner
Enclosure

9170P300/dw

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

In the Matter of the:

Petition of the City of Waupun for the Establishment of the Public Crossing of the Wisconsin & Southern Railroad Co. Tracks with Forest Mound Cemetery Trail in the City of Waupun, Dodge County

9170-RX-300

PROPOSED DECISION

By letter dated September 26, 2013, the City of Waupun petitioned the Office of the Commissioner of Railroads (OCR) pursuant to Wis. Stat. §§ 195.28 and 195.29 for the establishment of a public crossing of the Wisconsin & Southern Railroad Co. (WSOR) tracks with Forest Mound Cemetery Trail in the City of Waupun, Dodge County. The issues for the hearing are as stated in the original notice of hearing.

Pursuant to due notice, a public hearing was held in this matter on December 18, 2013 in Waupun, Wisconsin with hearing examiner Douglas S. Wood presiding.¹

Appearances:

Parties

City of Waupun, Petitioner
by
Richard W. Flynn, PE
Director of Public Works
201 E. Main Street
Waupun, WI 53963

In Opposition:

Wisconsin & Southern Railroad Company
by
Brian Baird, Attorney
Borgelt, Powell, Peterson & Frauen SC
735 N. Water Street
Milwaukee, WI 53213

PROPOSED FINDINGS OF FACT

The City of Waupun petitioned the Office of the Commissioner of Railroads to establish a highway/rail crossing of Forest Mound Cemetery Trail with the Wisconsin & Southern Railroad Co. tracks.² In 2010, the City began developing a plan for an off-road trail located in the environmental corridor along the Rock River. The City recently completed a trail segment from Meadowview Park to Edgewood Drive, part of which runs parallel to the tracks for about 900' south of Edgewood Drive. The City is completing a second segment from N. Madison Street to Fond du Lac Street in 2014.

¹ The OCR now publishes all notices, orders, proposed decisions and final decisions on the Internet. These documents may be accessed at either <http://ocr.wi.gov/apps40/dockets/default.aspx> or on the Public Service Commission's website at

<http://psc.wi.gov/>

² The OCR has long-recognized public pathways as "highways" for the purposes of Wis. Stat. §195.29.

The proposed crossing is part of a 2015 project for a third segment connecting Edgewood Drive with Tanner Park while also reconnecting with the Rock River. In order to do so, the City proposes to extend the new pathway east from the existing pathway beginning at a point about 740' south of Edgewood Drive. The trail would extend east into Forest Mound Cemetery and would cross the WSOR tracks about 40' east of the existing pathway. For the reasons set forth below, the **hearing examiner recommends that the petition be denied.**

As proposed by the City, Forest Mound Cemetery Trail will be 10' wide with a paved surface and would intersect the tracks at an angle of 85°. The pathway approach grade to the crossing would be -1.43% on the east. On the west, the pathway would descend at a grade of -6.28% over the first 14' east of the existing trail before leveling out to -0.99% over the remaining 26'. The crossing would consist of one mainline track.

This rail line is located on land owned by the Wisconsin Department of Transportation (DOT). The East Wisconsin Counties Railroad Consortium (EWCRC) is the local rail transit commission. Under the statutory scheme, the state owns the land and the transit commission owns the track and other improvements including tracks, ties, ballast, bridges, and all other associated improvements. The rail transit commission typically contracts with a private railroad to provide rail service, in this case the WSOR. See, Wis. Stat. §§ 59.58 and 66.1021.

The WSOR operates four through trains at a maximum timetable speed of 30 mph over the proposed crossing location. The railroad also uses this section of track for shoving movements about once or twice per week. These shoving operations help the railroad maximize the effective use of the EWCRC trackage.

As noted above, the Forest Mound Cemetery Trail would be about 740' south of the existing Edgewood Drive crossing. The existing trail terminates at its connection to the sidewalk on the south side of Edgewood Drive. That sidewalk does not currently cross the tracks. The Edgewood Drive roadway crossing has train-activated 12" LED automatic flashing lights with gates for warning devices.

Edgewood Drive carries 1260 ADT at a speed limit of 25 mph. Edgewood Drive is classified as a collector street. A study by the Waupun Police Department found that about 64% of all motorists on Edgewood Drive exceed the speed limit. The 85th percentile speed on Edgewood Drive was 31 mph.

At all crossings, except those with gates, a person stopped 15' short of the near rail must be able to see far enough down the track, in both directions, to determine if sufficient time exists to move safely across the tracks to a point 15' past the far rail, prior to the arrival of a train. Required clearing sight distance is dependent upon the maximum train speed and the acceleration characteristics of the "design" vehicle. For multi-use pathways, the OCR uses the clearing sight distance required for pedestrians as set forth in the USDOT Technical Working Group's *Guidance on Traffic Control Devices at Highway-Rail Grade Crossings*.³ The necessary clearing sight distance for a pedestrian at the proposed crossing is 341'. The available clearing sight distance would exceed 341' in all quadrants. The pedestrian clearing sight distance would be adequate.

A bicyclist traveling at 20 mph needs a stopping distance of about 120' on grades between 0% and +/-2% and about 140' on a descending 6% grade. A bicyclist traveling at 12 mph needs a stopping distance of about 60' on grades between 0% and +/-2% and about 70' on a descending 6% grade. A bicyclist traveling at 6 mph needs a stopping distance of about 30' on grades between 0% and +/-2% and about 35' on a descending 6% grade.

³ See Table 2 on page 6 of the report. The 530' pedestrian clearing sight distance requirement for 30 mph trains is based on the presence of *two tracks*. When adjusted for a single track crossing, the pedestrian clearing sight distance requirement drops to 341'. The full report is available at <http://safety.fhwa.dot.gov/intersection/resources/fhwas09027/resources/Guidance%20On%20Traffic%20Control%20at%20Highway%20Rail%20Grade.pdf>.

Given the proximity of the existing trail section located west of the proposed crossing, it is likely that *some* bicyclists turning from the north-south trail onto the proposed Forest Mound Cemetery Trail would be traveling at a speed that will deprive them of adequate stopping distance. However, because the trails are proposed to intersect at a right angle, it is likely that *most* bicyclists will significantly reduce speed as they approach the trail intersection. Bicyclists will also be able to see the proposed crossing from the parallel trail segment before they reach the trail intersection. Thus, most bicyclists would have adequate stopping sight distance.

The City proposed passive warning devices for the crossing, including crossbucks and either YIELD or STOP signs, advance warning signs, and pavement markings. The City also proposed to clear brush, flatten slopes, and fencing to discourage trespassing at other undeveloped locations to cross the tracks.

The Edgewood Drive roadway crossing has automatic flashing lights with gates. Using a crossing with automatic flashing lights and gates would be safer for trail users than using a crossing with just crossbucks and YIELD or STOP signs. It was unclear from the City's testimony whether the City would be willing to fund the installation of automatic flashing lights at the proposed crossing.

The OCR does not use its safety funds to pay for warning devices at new crossings, regardless of whether the new crossing is a pathway or roadway. The OCR has \$4.4 million in its annual safety program for the installation of warning devices at public crossings, enough to fund about 20 projects per year statewide. Given that there are just over 4000 public at-grade crossings in the state and less than half are equipped with train-activated warning devices, the demand for these funds outstrips the supply of money. When the need for train-activated warning devices is associated with a highway project, including a project for the establishment of a new pathway-rail crossing, the highway project is expected to fund those warning devices.

The railroad presented testimony that establishment of this trail crossing would significantly hamper the railroad's ability to effectively and efficiently use this segment of track. The railroad makes shoving moves at this location once or twice per week. The railroad currently has capacity here for 41-42 freight cars. Because shoving moves must stop clear of public crossings, establishment of this trail crossing would reduce the useful trackage to 29-30 cars, which is less than the railroad uses under current business conditions.

Trail crossings also increase the risk of derailments caused by ice compaction that occurs at crossings as a result of a freeze-thaw cycle. To limit the risk of such ice compaction derailments, railroads expend increased manpower resources to inspect crossings for ice compaction and manually remove it before trains can operate.

The railroad also argued that the new Forest Mound Cemetery Trail crossing is not needed because Edgewood Drive provides adequate access at a crossing with the highest level of warning devices. The City argued that Edgewood Drive is not an adequate alternative because this route would not be off-road and would force trail users to travel a route on two relatively busy collector streets (Edgewood Drive and N. Madison Street). The on-road route would also break the continuity of the trail because it would be several blocks away from the Rock River.

Without the proposed crossing *or some reasonably adequate off-road substitute*, the City's laudable efforts to provide a continuous trail for off-road, nonmotorized travel and recreation in an aesthetically attractive environmental corridor will be seriously harmed. An on-road route along city collector streets (Edgewood Drive and Madison Street) would be less safe than an off-road system. The City would end up with a series of short off-road trail systems disconnected from one another by an on-road segment. Such a disconnected trail system would be less attractive to potential trail users with a likely resultant decline in trail use.

Discussion

Establishment of the proposed crossing would harm the railroad's ability to provide freight service in a safe and cost-effective manner by limiting the usefulness of this section of track.

Second, pathway-rail crossings do present significant safety concerns. A 2013 study by the Illinois Center for Transportation found "a relatively constant number of pedestrian and bicycle fatalities at highway-rail and pathway-rail grade crossings over the past 10 years. This is in contrast to a marked decrease in train-vehicle collisions at highway-rail crossings."⁴ In this instance, an existing roadway crossing with automatic flashing lights and gates is just 740' away from the crossing location.

Third, the City has failed to meet the threshold test of showing that the crossing is necessary. There was hearing testimony about the possibility of building a "rails-with-trails" (within the railroad right-of-way) section of the Forest Mound Cemetery Trail on the east side of the tracks to Edgewood Drive, but the testimony was inconclusive. This alternative needs to be pursued because the use of rails-with-trails for that short segment would provide a *reasonably adequate off-road substitute* to the proposed trail crossing.

Rails-with-trails is an arrangement whereby the railroad shares the right-of-way with a public trail. While once highly unusual, rails-with-trails have become far more common as demonstrated by the tremendous growth in the number of rails-with-trails locations and mileage over the past two decades. According to a recent Rails-to-Trails Conservancy (RTC) report, in 2002 there were 523 miles of rails-with-trails in 65 separate locations in 30 states. By 2013, there were 1397 miles of rails-with-trails in at least 161 separate locations in 41 states located partially or entirely within the right-of-way of an active rail line.⁵ Times have changed with respect to the feasibility of rails-with-trails. Best practices have been developed. Greater experience with rails-with-trails has provided far more data to apply in evaluating rail-with-trails proposals.

On its face, it appears that allowing the use of the right-of-way for a trail would fall under the state's "recreational immunity" statute. Wis. Stat. § 892.52. Under the statute, property owners owe no duty to persons who enter "the owner's property to engage in a recreational activity...to keep the property safe for recreational activities... to inspect the property...[or] to give warning of an unsafe condition, use or activity on the property" Wis. Stat. § 892.52(2). Covered recreational activities under the statute include "bicycling... hiking...sight-seeing...and any other outdoor sport, game or educational activity..." Wis. Stat. § 895.52(1)(g). Property owners include private property owners and governmental bodies "that owns, leases or occupies property" or "has a recreational agreement with another owner." Wis. Stat. § 895.52(1)(d). A recreational agreement is "a written authorization granted by an owner to a governmental body...permitting public access to all or a specified part of the owner's property for any recreational activity." Wis. Stat. § 895.52(1)(h). Taken together, these provisions appear to grant immunity from liability to all relevant parties (DOT, ECWRC, City, and WSOR) for the injury or death of a rails-with-trails user.

Rails-with-trails have a good safety record. The RTC report found only one fatality and two injuries involving a train with a rails-with-trails user over a 20-year period. Rails-with-trails also provide a safe alternative to trespassing. As of 2013, eight rails-with-trails existed in Wisconsin.

Establishing a rails-with-trails segment would require an agreement between the City and DOT (and possibly the

⁴ *Pedestrian/Bicyclist Warning Devices and Signs at Highway-Rail and Pathway-Rail Grade Crossings*. The study reviews current practices with regard to pathway-rail crossings. <http://ict.illinois.edu/publications/report%20files/FHWA-ICT-13-013.pdf>

⁵ *America's Rails-with-Trails: A Resource for Planners, Agencies and Advocates on Trails Along Active Railroad Corridors* (2013). <http://www.railstotrails.org/ourWork/reports/railwithtrail/report.html>

For additional background information see the 2002 U.S. Department of Transportation report *Rails-with-Trails: Lessons Learned* https://www.fhwa.dot.gov/environment/recreational_trails/publications/rwt/

ECWRC and the WSOR as well). Whether such an agreement could ultimately be consummated is unknown. The City indicated that it approached the railroad “years ago” about running the trail parallel to the tracks without success. A rails-with-trails segment at this location has not been sufficiently or rigorously pursued by the City to determine its feasibility.

The railroad right-of-way here is 100’ wide. DOT requires a minimum of 33’ lateral distance between the centers of the track and the trail. It appears that the minimum clearance requirement probably could be met. Other conditions may also be required, such as fencing between the track and trail.

A rails-with-trails segment running along the east side of the tracks between the Forest Mound Cemetery Trail and Edgewood Drive would allow the City to meet its primary goal of establishing a continuous off-road trail in the Rock River environmental corridor. While a rails-with-trails section would add about 1400’ travel distance for trail users, the trail would be off-road and near the Rock River. On the other hand, while a rails-with-trails connection would require the railroad to share the right-of-way with the pathway, it would also make the proposed new at-grade pathway crossing entirely redundant. The **hearing examiner** strongly encourages the City to pursue with DOT an evaluation of the feasibility of rails-with-trails here.

The **hearing examiner** concludes that establishment of the proposed crossing of the Forest Mound Cemetery Trail with the Wisconsin & Southern Railroad Co. tracks would not promote public safety and convenience.

PROPOSED ULTIMATE CONCLUSIONS ON THE ISSUES

1. That the establishment of the crossing at-grade of Forest Mound Cemetery Trail with the Wisconsin & Southern Railroad Co. tracks in accordance with the design plans of the City of Waupun in the City of Waupun, Dodge County would not promote public safety and convenience.
2. That establishment of the crossing is inadvisable under all the circumstances.

PROPOSED CONCLUSION OF LAW

That the Office of the Commissioner of Railroads has jurisdiction under Wis. Stat. §§ 195.28 and 195.29 and the Office enters an order consistent with the findings of fact.

PROPOSED ORDER

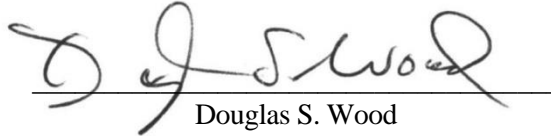
The hearing examiner recommends:

1. That the Petition of the City of Waupun for the Establishment of the Public Crossing of the Wisconsin & Southern Railroad Co. Tracks with Forest Mound Cemetery Trail in the City of Waupun, Dodge County be **denied**.

2. That jurisdiction is retained.

Dated at Madison, Wisconsin, June 18, 2014.

By the Office of the Commissioner of Railroads.



Douglas S. Wood
Hearing Examiner

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